Filed 5/7/19 Berry v. Madera Hotel CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DAVID L. BERRY, as Trustee, etc. et al.,

Plaintiffs and Appellants,

v.

MADERA HOTEL LLC,

Defendant;

KANWAL J. SINGH,

Defendant, Intervener and Respondent.

F075618

(Super. Ct. No. MCV063168)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Michael J. Jurkovich, Judge.

Wanger Jones Helsley, Timothy Jones, Kurt F. Vote and Marisa L. Balch for Plaintiffs and Appellants.

Doerksen Taylor Stokes, Charles L. Doerksen and Travis R. Stokes for Defendants, Intervener and Respondent.

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This appeal provides an example of the difficulty of pursuing a statute of limitations defense at the pleading stage. Generally, a statute of limitations begins to run

when the last element of the cause of action accrues, and California's pleading rules do not require a plaintiff to allege specific facts that establish when the last element of a cause of action for quantum meruit or breach of an implied or quasi contract occurred.

In this case, the owners of a one-half interest in a limited liability company advanced funds to the company to complete a construction project and to pay down the construction loan to $5 million so it could be replaced by a take-out loan. They sued the company to recover the funds advanced after the doctor owning the other 50 percent of the company would not acknowledge the advances as either contributions to capital or loans to the company and the dispute was not resolved in mediation. The referee handling the matter determined the claims against the company were barred by the statute of limitations and by the terms of the company's operating agreement, which required the unanimous written consent of the members before the company could enter loans over $10,000. The referee's decision, which was based on the pleadings, was implemented by the superior court filing a judgment of dismissal.

Plaintiffs appealed, contending questions of fact existed about (1) when the causes of action accrued, (2) the application of equitable estoppel and equitable tolling, and (3) whether the operating agreement's restrictions on borrowing were waived or rescinded. We conclude questions of fact exist about when plaintiffs' causes of action accrued. For example, the company's implied contractual obligation to repay the funds advanced may have arisen only after the company's operations were generating more cash flow than needed to pay its operating expenses and service the $5 million bank loan. When that occurred and, thus, when the cause of action accrued does not clearly and affirmatively appear on the face of the complaint and matters subject to judicial notice. Also, whether the restrictions in the operating agreement were rescinded or waived presents questions of fact that cannot be resolved at the pleading stage.

We therefore reverse the judgment of dismissal and remand for further proceedings.

FACTS

David L. Berry and Patricia Rea Berry, trustees of the David and Patricia Berry Living Trust, are the plaintiffs in this lawsuit and are referred to collectively as "Berry Trust." In November 2007, Berry Trust and defendant Kanwal J. Singh, M.D., formed defendant Madera Hotel, LLC (LLC) for the purpose of constructing and operating a hotel and a restaurant on land adjacent to Highway 99 and across from Madera Community Hospital. Berry Trust and Dr. Singh are members of the LLC and each own a 50 percent interest. David L. Berry has been the managing member of the LLC since its formation.

Berry Trust and Dr. Singh agreed to use Berry & Berry, Inc., a licensed general contractor, to build the hotel and restaurant project. Berry & Berry, Inc. is owned by Berry Trust. On May 27, 2008, the LLC obtained a construction loan for $8.05 million from Citizens Business Bank (Bank) to cover a portion of the construction cost for the hotel (Construction Loan). Dr. Singh personally guaranteed the Construction Loan. To obtain the Construction Loan, David Berry and Dr. Singh executed a letter of understanding stating the total construction cost would exceed $10.55 million and the LLC would provide the funds in excess of the Construction Loan.

The hotel was a design-build project, meaning the construction began before the final plans were completed. This approach increases the flexibility by allowing construction to begin while particular options or upgrades are decided later.

Berry Trust alleges the LLC and Dr. Singh agreed on numerous occasions to expand the scope of work, which included improvements to the diner and the hotel. Berry Trust also alleges the LLC and Dr. Singh agreed to pay certain start-up costs for the hotel. The Construction Loan proved insufficient to cover the construction and start-up costs of the project. Berry Trust informed Dr. Singh that the LLC required additional funding and asked Dr. Singh to contribute his 50 percent share of the required funds. Dr. Singh refused to provide any funds to the LLC, claiming he was financially unable to do

so. Dr. Singh did not dispute the LLC's need for additional funds or that the members should provide the necessary funds to the LLC. He did not ask if Berry Trust would provide the funding and never advised Berry Trust he would insist on strict adherence to the LLC's operating agreement as it related to the LLC borrowing money.

After Dr. Singh's refusal to contribute funds to the LLC, Berry Trust assumed the full burden of keeping the LLC operational, which protected both its investment and the investment of Dr. Singh. Berry Trust provided eight separate checks totaling $1,352,000 to the LLC.

The Construction Loan's due date was November 27, 2009. Bank extended the loan several times. The LLC sought to replace the Construction Loan with a long-term take-out loan. Bank required the Construction Loan to be paid down to achieve a 50 percent loan-to-value ratio before it would make the take-out loan. Bank's proposed terms were backed up with a threat of foreclosure, which would have resulted in the LLC losing the project and the members losing their investment. The hotel and restaurant were appraised at $10 million and, as a result, Bank required the Construction Loan to be paid down to $5 million.

The LLC lacked the funds to pay down the Construction Loan. Berry Trust asked Dr. Singh to contribute 50 percent of the funds needed. Again, he refused on the ground he was financially unable to provide the funds. He did not object to Berry Trust providing the funds and did not tell Berry Trust that if the LLC borrowed money from the trust he would attempt to prevent it from being repaid. If Berry Trust had not provided the funds to refinance the Construction Loan, Bank would have foreclosed and the project and future profits would have been lost.

To restructure the Construction Loan as a long-term loan, Berry Trust obtained funds by refinancing two of its properties. Berry Trust used approximately $2,540,000 in funds from the equity in the properties to pay down the Construction Loan and meet Bank's loan-to-value requirements. As a result, the Construction Loan was converted to

a long-term loan on October 27, 2010. Bank prepared new loan documents. Dr. Singh agreed to the new documents and signed them. As a result of the cash payments made to the LLC and the funds paid to Bank on behalf of the LLC, Berry Trust provided the LLC with nearly $3.9 million in funding.

Sometime after the Construction Loan had been refinanced, Dr. Singh disputed the LLC's responsibility to repay any of the $3.9 million in funds Berry Trust provided. He refused to attend meetings of the LLC's members, which produced a deadlock among the two members on the question of repayment.

PROCEEDINGS

Mediation

A provision of the LLC's operating agreement provides that if the members cannot resolve a dispute to their mutual satisfaction, the matter shall be submitted to mediation upon the written request of one member to the other. In May 2011, Berry Trust submitted a formal mediation demand to Dr. Singh for the resolution of the disputes regarding the repayment of Berry Trust's loans to the LLC. Mediation discussions were held with Judge Howard Broadman (Ret.), but the parties failed to reach resolution. By March 2013, Dr. Singh had not resumed his participation in the mediation process and had failed to attend a meeting of the members of the LLC. The details of the attempted mediation are not relevant to the issues decided in this appeal.

Arbitration

In May 2013, Berry Trust filed a petition to compel arbitration in Madera Superior Court. Dr. Singh was the only respondent named in Berry Trust's petition. The petition sought resolution of the disputes regarding the repayment of Berry Trust's loans to the LLC and payment of the sums due Berry & Berry for construction costs. The court assigned case No. MCV063168.[1]

[1] In March 2013, Berry & Berry, Inc. filed a complaint for damages against the LLC. Madera Superior Court assigned case No. MCV062748 and the parties refer to the

Dr. Singh opposed the petition to compel arbitration. He argued, among other things, that the requested arbitration would be meaningless because neither the LLC nor Berry & Berry, Inc., the contractor that built the hotel and restaurant and then sued the LLC, would be parties to the arbitration and the disputes involving Dr. Singh and David Berry extended to these entities.

On June 13, 2013, the superior court granted the petition and ordered Berry Trust and Dr. Singh to arbitrate the controversies existing between them in accordance with the provisions of the LLC's operating agreement. The order directed "[t]he scope of the issues to be arbitrated shall be decided by the Arbitrator."

On November 26, 2013, pursuant to the parties' stipulation, the superior court appointed Broadman (Referee) as referee pursuant to Code of Civil Procedure section 638. The stipulation and order directed the Referee to hear, try and determine all the issues of fact and law in the Loan Case and the Construction Case. It also provided for the bifurcation of all issues relating to statute of limitation defenses asserted in the two cases.

On May 10, 2016, the Referee signed a referee's statement of decision addressing the statute of limitations issue. The Referee found "good cause to equitably estop Dr. Singh from asserting the statute of limitations defense against the claims of the Berry [Trust]" in the Loan Case.

Complaint on Loan Case

On September 16, 2016, Berry Trust filed a complaint against the LLC and Dr. Singh.[2] The complaint contained seven causes of action. Dr. Singh filed a demurrer,

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matter as the "Construction Case." Berry & Berry, Inc. alleged it had been paid approximately $8.13 million for building the hotel and restaurant and the LLC still owed it approximately $2.76 million.

[2] The parties refer to the matter as the "Loan Case." It was filed under superior court case No. MCV063168.

contending the second (quasi-contract) and third (quantum meruit) causes of action did not state facts sufficient to constitute a cause of action. The Referee sustained Dr. Singh's demurrer with leave to amend.

In November 2016, Berry Trust filed a first amended complaint, again naming Dr. Singh and the LLC as defendants. Dr. Singh again demurred, contending the causes of action against him individually for quasi-contract, quantum meruit, and money paid did not state facts sufficient to constitute a cause of action. Dr. Singh supported the demurrer with a request for judicial notice of the LLC's operating agreement, a copy of which had been attached to Berry Trust's petition to compel arbitration. On November 28, 2016, the Referee signed a ruling sustaining Dr. Singh's demurrer to the three causes of action without leave to amend.

On December 23, 2016, Dr. Singh filed a complaint in intervention in which he requested an order allowing him to intervene on behalf of the LLC. Dr. Singh stated the LLC had significant defenses to the claims asserted in Berry Trust's first amended complaint. Dr. Singh also filed, in the capacity of an intervenor on behalf of the LLC, a demurrer to the first amended complaint that challenged all of the causes of action against the LLC. One ground asserted the causes of action against the LLC were barred by the applicable statute of limitations. Berry Trust opposed the demurrer, again arguing it sought the determination of factual issues that could not be decided at the pleading stage. Berry Trust supported its opposition by requesting judicial notice of its petition to compel arbitration filed in May 2013. On January 5, 2017, the Referee sustained the demurrer with leave to amend.

Second Amended Complaint in Loan Case

On January 9, 2017, Berry Trust filed its second amended complaint (SAC). The SAC, which is the operative pleading in this appeal, alleged causes of action against the LLC for (1) breach of implied-in-fact contract, (2) quantum meruit, and (3) money lent, a common count. It also alleged a fourth cause of action against both Dr. Singh and the

LLC for declaratory relief. The prayer for relief requested damages in the principal amount of $3,894,068.03, prejudgment interest, a declaration that the LLC should repay the loans, and a declaration as to the rights and duties of the LLC and its members as to the repayment of the sums advanced by Berry Trust.

Dr. Singh, as intervenor on behalf of the LLC, responded to the SAC by filing a motion to dismiss under Code of Civil Procedure section 592, requesting the Referee decide matters of law before issues of fact are presented. The motion asserted, among other things, that all of the causes of action against the LLC were time barred.

On January 9, 2017, the first day of the trial before the Referee, the parties stipulated to the SAC being deemed filed and agreed to address the section 592 motion. The Referee treated the motion as a demurrer and sustained it, without leave to amend, based on the statute of limitations and the failure to comply with the provisions of the LLC's operating agreement.

Judgment and Appeal

On January 19, 2017, a judge of the superior court signed and filed a judgment implementing the Referee's rulings. The judgment decreed that Berry Trust recover nothing from Dr. Singh or the LLC and stated the matter of costs and attorney fees would be heard and decided by the Referee. After the denial of its motion for new trial, Berry Trust filed a notice of appeal.[3]

In June 2017, the superior court filed orders awarding Dr. Singh costs in the amount of $8,995.38 and attorney fees in the amount of $232,079. In August 2017, Berry Trust appealed these orders and that appeal was assigned case No. F076157.

[3] In April 2017, a $3.4 million judgment, which included prejudgment interest, was entered in the Construction Case in favor of Berry & Berry, Inc. That judgment is before this court as case No. F075645.

DISCUSSION

I. STATUTE OF LIMITATIONS

A. General Principles

1. Last Element Accrual Rule and Its Exceptions

Statutes of limitation prescribe the length of time a plaintiff is given to bring suit or be barred. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 (*Aryeh*).) Generally, the limitations period "runs from the moment a claim accrues." (*Ibid*.; Code Civ. Proc., § 312 [action must be "commenced within the periods prescribed in this title, after the cause of action shall have accrued"].) California follows the "'last element'" accrual rule, which holds that the statute of limitations runs from the occurrence of the last element essential to the cause of action. (*Aryeh*, *supra*, at p. 1191.) Our Supreme Court has described the essential elements for statute of limitations purposes as "'wrongdoing, harm, and causation.'" (*Ibid*.)

The foregoing general rules are subject to a handful of modifications and equitable exceptions that alter the initial accrual of a cause of action, the subsequent running of the limitations period, or both. (*Aryeh*, *supra*, 55 Cal.4th at p. 1192.) These exceptions and modifications include the discovery rule, equitable tolling, equitable estoppel, the continuing violation doctrine, the theory of continuous accrual, and waiver. (*Ibid*.; *Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 689 [defendant may waive—i.e., intentionally relinquish—the right to rely on the statute of limitations] (*Prudential*); *Ard v. County of Contra Costa* (2001) 93 Cal.App.4th 339, 348 [judgment of dismissal reversed, plaintiff granted leave to amend to allege equitable estoppel prevented the claim from being time barred].)

2. Equitable Tolling

Equitable tolling suspends or stops the running of the limitation period "when a plaintiff has reasonably and in good faith chosen to pursue one among several remedies

and the statute of limitations' notice function has been served." (*Aryeh, supra*, 55 Cal.4th at p. 1192; see *Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1011 ["tolled" means "suspended" or "stopped"].) The elements of "equitable tolling [are] timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." (*Addison v. State of California* (1978) 21 Cal.3d 313, 319.) An expanded description of these three elements is "(1) timely notice to the defendant against whom the doctrine will apply given at or about the time of seeking the first remedy; (2) lack of prejudice to the defendant in gathering evidence and preparing for the second remedy; and (3) good faith and reasonable conduct by the plaintiff." (1 Schwing & Carr, California Affirmative Defenses (2018) § 25:70, pp. 1871–1872, fns. omitted.)

Whether these elements exist presents questions of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [equitable tolling presents questions of fact].) The trial court, not a jury, is the proper trier of fact to decide whether a limitations period has been equitably tolled. (*Id*. at pp. 745–746.)

3. Equitable Estoppel

Equitable estoppel "'arises as a result of some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.'" (*Prudential, supra,* 51 Cal.3d at pp. 689–690.) Equitable estoppel involves some degree of fault or blame on the part of the party to be estopped and, therefore, "will not be applied against one who is blameless." (30 Cal.Jur.3d (2013) Estoppel and Waiver, § 3, p. 824.)

"Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must [reasonably] rely upon the conduct to his

injury." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 (*Driscoll*); *Santos v. Los Angeles Unified School Dist.* (2017) 17 Cal.App.5th 1065, 1076 [plaintiff's reliance must be reasonable under the circumstances] (*Santos*); see 30 Cal.Jur.3d, *supra*, Estoppel and Waiver, § 7, pp. 833–834.)

Normally, the elements of equitable estoppel present questions of fact for the court (not a jury) to determine. (*Santos*, *supra*, 17 Cal.App.5th at pp. 1076, 1080–1081 [summary judgment reversed; triable issues of fact as to existence of equitable estoppel].) However, the existence of equitable estoppel may be decided as a matter of law "when the undisputed evidence is susceptible of only one reasonable inference." (*Id*. at p. 1076; *Driscoll*, *supra*, 67 Cal.2d at p. 305.)

B. Demurrers and Standard of Review

In this case, the parties and the Referee treated Dr. Singh's motion under Code of Civil Procedure section 592 as a demurrer. That section states that where "there are issues of both law and fact, the issue of law must be first disposed of." (Code Civ. Proc., § 592.) A demurrer tests the legal sufficiency of the factual allegations in a pleading. (*Restore Hetch Hetchy v. City and County of San Francisco* (2018) 25 Cal.App.5th 865, 871; Code Civ. Proc., § 430.10, subd. (e).)

Under Code of Civil Procedure section 430.30, subdivision (a), when "any ground for objection to a complaint … appears on the face thereof, … the objection on that ground may be taken by a demurrer to the pleading." The statute of limitations is a "ground for objection to a complaint" for purposes of this provision and, therefore, may be raised in a demurrer. (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 493.) Generally, an order sustaining a demurrer on statute of limitations grounds is subject to de novo review on appeal. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*).)

Defendants who pursue a statute of limitations defense at the pleading stage have a difficult task. First, the application of a statute of limitations to a particular case usually involves questions of fact. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810 [issues involving a statute of limitations defense, such as delayed accrual under the discovery rule, normally are questions of fact]; *Hopkins v. Kedzierski, supra,* 225 Cal.App.4th at p. 745 ["equitable estoppel and equitable tolling present questions of fact"]; *Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1012 ["we are hard pressed to think of more fact-specific issues than 'accrual' and 'tolling'"].)

Second, the procedural rules of law applied at the pleading stage of the litigation favor the plaintiff, not the defendant. Those rules require reviewing courts to treat the demurrer as admitting the truth of all material facts alleged in the complaint and gives the plaintiff the benefit of facts that may be inferred reasonably from the expressly alleged facts. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403; see *Committee for Green Foothills, supra,* 48 Cal.4th at p. 42 [complaint given a reasonable interpretation]; Code Civ. Proc., § 452 [pleadings given liberal, yet reasonable, construction].) Also, California's rules of pleading do not require plaintiffs to allege when their causes of action accrued. Although a pleading might allege facts sufficient to decide when a cause of action accrued, where the relevant facts are not clear and the cause of action might be, but is not necessarily, time barred, the demurrer will be overruled. (*Committee for Green Foothills, supra,* at p. 42.) In sum, it is well settled that the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed before a demurrer based on the statute of limitations will be sustained. (*Ibid.*; *Marshall v. Gibson, Dunn & Crutcher, supra,* at p. 1403 [allegations in complaint showing claim might be barred are not enough].)

C. Contentions of the Parties

1. Dr. Singh

Dr. Singh contends that the allegations in the SAC establish that "Berry Trust's causes of action against the LLC accrued, at the latest, in late-2010." This contention is based on (1) the allegations that all of the loans to the LLC were made before October 27, 2010 and (2) Dr. Singh's view that the causes of action accrued when the LLC failed to make its first payment due on the alleged loans—that is, a month after October 27, 2010. Based on a 2010 accrual and a two-year limitations period, Dr. Singh argues Berry Trust's 2016 complaint was filed four years too late.

2. Berry Trust

Berry Trust disagrees with Dr. Singh's interpretation of the SAC on the subject of when its claims accrued. Berry Trust argues a quasi-contract claim accrues when the windfall occurs, which depends on the nature of the parties' relationship and expectations as to when compensation would be due. Berry Trust also appears to argue the LLC's obligation to repay was dependent upon the LLC's ability to pay, which depended on the LLC's generating a positive cash flow or the members resolving their dispute. The resolution of the dispute might have resulted in Dr. Singh injecting additional cash into the business, which would have enabled the LLC to make payments on the loan[4] even if the cash flow generated from initial business operations was not sufficient.

Berry Trust also contends the facts alleged are sufficient to show the applicable limitations period was tolled (1) from June 10, 2011, to March 15, 2013, by attempts of all the members of the LLC to mediate claims related to the loans and (2) from May 21,

[4] For example, if Dr. Singh made a contribution to the LLC's capital in an amount equal to one-half of Berry Trust's loan, those funds could have been used to pay down half of the loan and the remaining half of the loan could have been retired by treating it as a capital contribution by Berry Trust. In that scenario, Dr. Singh and Berry Trust would have made equal contributions to the LLC's capital, which would have corresponded to the 50 percent ownership interest each holds in the LLC.

2013, while the arbitration proceedings were pending, until September 16, 2016, the date the complaint was filed. (See Code Civ. Proc., § 350 ["action is commenced … when the complaint is filed"].) If these tolling periods and Dr. Singh's accrual date of October 27, 2010, are correct, the statute of limitations would have run for approximately 11 months before the complaint was filed on September 16, 2016.

D. Accrual: Initial Breach

A cause of action based on implied or quasi contract is subject to the general rule that the statute of limitations begins to run when the cause of action accrues. (*Lazzarevich v. Lazzarevich* (1948) 88 Cal.App.2d 708, 720.) When a cause of action based on implied or quasi contract accrues "depends largely on the facts of each particular case." (*Ibid*.) The action lies for money paid by mistake or for money obtained through imposition, either express or implied. (*Ibid*.) The gist of the action is that the defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money. (*Ibid*.)

The foregoing principles establish that the obligation to repay money based on an implied or quasi contract may vary with the circumstances of the case. In this case, it is possible that the obligation of the LLC to repay the funds obtained from Berry Trust would not arise until the LLC was making sufficient income to meet its operating expenses of and to service the debt owed to the Bank. It is unclear from the face of the SAC and petition to compel arbitration when the LLC achieved the ability to meet these other obligations and was able to begin payments to Berry Trust. Therefore, we cannot discern when the statute of limitations began to run, which is essential to determining when the limitations period expired.

We reject Dr. Singh's theory that "Berry Trust's causes of action accrued when the LLC failed to make its first payment due on the loans, a month after October 27, 2010." That theory is not based on facts stated in the SAC, but is based on inferences favorable

to the LLC. Drawing such inferences is contrary to the rule that a complaint is to be construed in favor of the plaintiff. (*Advanced Modular Sputtering, Inc.* (2005) 132 Cal.App.4th 826, 835 ["pleadings are to be liberally construed in favor of the pleader"].) Stated another way, drawing inferences in favor of a defendant seeking to establish a statute of limitations defense is contrary to the rule that the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed before a demurrer based on the statute of limitations will be sustained. (*Committee for Green Foothills*, *supra*, 48 Cal.4th at p. 42; *Marshall v. Gibson, Dunn & Crutcher*, *supra*, 37 Cal.App.4th at p. 1403.)

E. Accrual: Separate Monthly Wrongs

"Under the continuous accrual theory, 'a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period. [Citation.]' [Citation.] The kinds of cases in which the continuous accrual theory have been applied ... include a variety of instances in which the plaintiff asserted a right to, or challenged the assessment of, periodic payments under contract ...." (*Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 378–379.)

Here, Dr. Singh's appellate brief referred to the "first payment due on the loans," stating it became due a month after October 27, 2010. This suggests that the LLC had an obligation to make monthly payments. Under the continuous accrual theory, Berry Trust might be partially time-barred as to the older monthly payment obligations, but would not be time-barred as to the monthly payments that first became due within the applicable limitations period. It is unclear from the face of the SAC and petition to compel arbitration how many monthly payments would be owed under the implied-in-fact contract. As a result, it does not clearly and affirmatively appear on the face of the complaint and matters subject to judicial notice that the *last* monthly payment was due on

a date outside the applicable limitations period, regardless of whether that period be two or three years. Therefore, the continuous accrual theory provides a separate ground for rejecting the statute of limitations defense at this stage of the case.

F. Tolling and Estoppel

Based on our determinations regarding accrual, it is unnecessary to determine (1) whether the applicable statute of limitations is two or three years or (2) whether the running of the limitations period was suspended based on equitable tolling or equitable estoppel. Accordingly, whether Berry Trust should be allowed on remand to amend its pleading to allege additional facts supporting these alternate theories for defeating a statute of limitations defense is a question we need not reach. (Cf. *Ard v. County of Contra Costa, supra,* 93 Cal.App.4th at p. 348 [judgment of dismissal reversed, plaintiff granted leave to amend to allege equitable estoppel prevented the claim from being time barred].)

II. OPERATING AGREEMENT

A. Contentions of the Parties

1. Dr. Singh

Dr. Singh contends the breach of an implied-in-fact contract cause of action fails due to the requirements of the LLC's operating agreement. Dr. Singh refers to various restrictions on contracting and incurring debt set forth in the operating agreement. For instance, section 3 of article B of the operating agreement states the managing member shall have no authority without the unanimous written consent of the members to incur debts to a single creditor of the LLC in excess of $10,000. Dr. Singh contends the SAC fails to state facts sufficient to constitute a cause of action because it does not allege the

loans were authorized in the manner required by the operating agreement. (See former Corp. Code, §§ 17015, subd. (d), 17157, subd. (c).)[5]

2. Berry Trust

Berry Trust contends the Referee erred in holding the operating agreement barred the claims alleged the SAC and in considering evidence outside the face of the complaint. Berry Trust contends the Referee went beyond impliedly taking judicial notice of the existence of the operating agreement when it concluded particular provisions were in effect, governed the relationship between Berry Trust and the LLC, and barred the loans. Berry Trust argues the judgment of dismissal denied it the opportunity to prove the provisions in the operating agreement addressing a member's ability to incur debt on behalf of the LLC in excess of $10,000 had been voided, waived or rescinded.

B. Judicial Notice

A demurrer may be based on the face of the complaint or "any matter of which the court is required to or may take judicial notice." (Code Civ. Proc., § 430.30, subd. (a); see *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Thus, a court considering a demurrer may take judicial notice of the existence, content and authenticity of public records and other specified documents. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1262.) However, courts do not take judicial notice of the truth of the factual matters asserted in those documents. (*Mangini, supra,* at p. 1063.)[6]

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[5] The events that are the basis for Berry Trust's claims against the LLC occurred before the California Revised Uniform Limited Liability Company Act (Corp. Code, § 17701.01 et seq.) became operative on January 1, 2014 (Corp. Code, § 17713.13), and replaced the Beverly-Killea Limited Liability Company Act. (Former Corp. Code, § 17000 et seq.; see Stats. 2012, ch. 419, §§ 19, 20.)

[6] An exception to the rule against taking judicial notice of factual matters stated in a document is related to Evidence Code section 622, which provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a

The application of these principles defining the scope of judicial notice is illustrated in part by *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919. There, our Supreme Court stated the trial court properly noticed the existence and contents of recorded documents—specifically, a deed of trust, an assignment of the deed of trust, a substitution of trustee, notices of default and of trustee's sale, and a trustee's deed upon sale. (*Id*. at p. 924, fn. 1.) The court stated it would "take notice of their existence and contents, *though not of disputed or disputable facts stated therein*." (*Ibid*., italics added.)

The specific question about whether a court can take judicial notice of the legal or operative effect of a contract has been addressed in published decisions. In *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, the First District stated: "Where, as here, judicial notice is requested of a legally operative document—like a contract—the court may take notice not only of the fact of the document and its recording or publication, but also facts that clearly derive from its legal effect. [Citation.] Moreover, whether the fact derives from the legal effect of a document or from a statement within the document, the fact may be judicially noticed where, as here, *the fact is not reasonably subject to dispute*." (*Id*. at p. 754, italics added.)

Based on *Ivanova* and *Scott*, we conclude the operative effect of a provision in contract is not subject to judicial notice when the operative effect of the provision is reasonably subject to dispute, even though the existence and contents of the contract itself is subject to judicial notice. Under this principle, we conclude Berry Trust has reasonably disputed the operative effect of the provisions in the operating agreement restricting the contracts the managing member could enter without the unanimous consent of the members. The allegations in the SAC under the heading "The LLC's Need

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consideration." (See *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375 [recitals in exhibits attached to complaint].)

for Additional Financial Support," when accepted as true, adequately and reasonably support the possibility that the restrictions in the operating agreement were waived or Dr. Singh is estopped from asserting them on behalf of the LLC. Therefore, we conclude the operating agreement does not necessarily bar the claims set forth in the SAC and questions of fact must be resolved to determine the legal or operative effect of the agreement.

DISPOSITION

The judgment of dismissal is reversed and the matter remanded for further proceedings. Appellant shall recover its costs on appeal.

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FRANSON, J.

WE CONCUR:

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LEVY, Acting P.J.

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SNAUFFER, J.